

DENNIS POTTS

IBLA 79-207

Decided September 11, 1979

Appeal from decision of the Utah State Office, Bureau of Land Management, rejecting geothermal resources lease application U-39801.

Affirmed and case remanded for further action.

1. Exchanges of Land – Federal Land Policy and Management Act of 1976:  
Disclaimers of Interest

Where private land exchange was for surface rights only and applicant's warranty deed mistakenly conveys a fee simple absolute, the facts concerning which are well-documented, on equitable principles an applicant may be entitled to issuance of a disclaimer of interest in the mineral estate. 43 U.S.C. § 1745 (1976).

2. Geothermal Leases: Generally – Geothermal Leases: Applications: Generally –  
Geothermal Leases: Discretion to Lease – Geothermal Leases: Lands Subject to

It is proper to reject an application for a geothermal resources lease where equitable title to the resource in issue is doubtful.

APPEARANCES: Dennis Potts, pro se; Emil Nowers, pro se; Dr. John V. A. Sharp, attorney-in-fact for Supron Energy Corp., Reno, Nevada.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Dennis Potts appeals the decision of the Utah State Office, Bureau of Land Management (BLM), rejecting his geothermal resources lease application U-39801.

Although we customarily recite the events immediately culminating in the appeal, this case arises out of events relative to a private land exchange which transpired many years ago. We shall therefore begin our discussion chronologically, from that point in time.

In 1950 appellee Nowers initiated private land exchange U-0519, pursuant to the Taylor Grazing Act, 48 Stat. 1269, as amended, 49 Stat. 1976, section 8(b), 43 U.S.C. § 315g (1976). <sup>1/</sup> Exchange application U-0519 was amended in 1951 for reasons not here relevant and further amended in 1955. The latter amendment is the origin of the controversy now under consideration.

In that year, the exchange application was amended by reserving to each grantor respectively, all oil, gas, and mineral rights in the subject lands. <sup>2/</sup>

Appellee Nowers tendered title to the offered lands by warranty deed dated March 30, 1956. The exchange was consummated by issuance of Patent No. 1164557, dated September 16, 1956, in which the mineral estate in the selected lands was accordingly reserved to the United States. Contrary to the clear intent of the parties, however, by inadvertence of appellee's counsel at that time (who is now deceased), the warranty deed failed to similarly reserve the mineral estate. The documents of conveyance were duly recorded. Despite knowledge of the omission, the situation has remained unchanged for the past 22 years, although BLM has since acted on the true intentions of the parties by refusing to exert any proprietary control over the mineral estate in the deeded lands.

On February 24, 1978, appellant filed his geothermal resources application, U-39801, to lease the lands described in the warranty deed. Between the filing of appellant's application and rejection thereof, infra, the Utah State Director requested the opinion of the Regional Solicitor's Office regarding the propriety of resolving the problem by issuing to appellee Nowers a quitclaim deed pursuant to 43 CFR 2204.3.

By letter dated May 31, 1978, the Regional Solicitor's Office opined that while there existed no legal obstruction to correcting "a mere clerical error," the proper authority for such action is

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<sup>1/</sup> Repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2743, section 705(a).

<sup>2/</sup> The lands offered by Nowers are situated in T. 30 S., R. 12 W., Salt Lake meridian: S 1/2 sec. 16; S 1/2 sec. 17. The lands selected are situated in T. 30 S., R. 7 W., Salt Lake meridian: lot 4, SW 1/4 sec. 4; lots 1 and 2, SE 1/4 NE 1/4, NE 1/4 SE 1/4, S 1/2 SE 1/4 sec. 5; N 1/2 NE 1/4 sec. 8; and N 1/2 NW 1/4 sec. 9.

the Federal Land Policy and Management Act of 1976 (FLPMA), section 315, 43 U.S.C. § 1745 (1976).

On June 12, 1978, appellant's application was rejected. As grounds therefor, the decision stated the following:

The warranty deed conveying the offered lands to the United States did not contain a clause reserving all minerals even though it was intended at the time of the exchange that minerals be reserved by all parties. . . . The BLM plats that have been maintained since the exchange have shown minerals in the offered lands reserved in the name of the grantor. . . . [T]he United States does not own the geothermal resources interest in the lands applied for.

Appeal of the June 12th decision was timely noted. We will postpone discussion of the reasons therefor, as they are essentially repeated in this appeal.

This Board rendered its decision on August 28, 1978, Dennis Potts, 36 IBLA 329. We therein found that:

The record clearly substantiates that BLM entered into the exchange with the understanding that no minerals in the offered lands would vest in the United States. . . . The notice [which opened the offered lands to nonmineral entry, 23 F.R. 978-980 (1958)] stated that the minerals in the [offered lands] were not conveyed to the United States. The status plat for T. 30 S., R. 12 W., indicates only that [the subject lands] were conveyed to the United States by warranty deed, and does not show that any minerals were reserved to the grantor.

Accordingly, we set aside and remanded the decision for further consideration, on the ground that it was not supported by the land status reflected on the Master Title Plat.

A request for reconsideration was submitted by BLM on October 30, 1978, on the theory that this Board had misinterpreted the land status notations:

If it had been our intention to show conveyance of minerals, the plat would have shown "MIN," under the entry "U-0519." We suspect that the confusion comes from the fact that reservations in reconveyances are noted just opposite the way they would be shown for reconveyances out of public ownership.

Our Order of January 16, 1979, denied the petition for reconsideration, no error on our part having been demonstrated. Instructions

from the BLM Manual, 1275.33, were therein set forth, showing that the land records were correctly noted to reflect that appellee Nowers had ostensibly conveyed the lands to the United States in fee simple absolute. We will comment further on the import of this Order, infra.

By decision dated January 26, 1979, appellant's application was rejected a second time on the ground that the United States would not enrich itself unjustly by obligating the mineral rights in the subject lands. The decision was premised on the additional ground that BLM declined to exercise its discretion to issue a geothermal resources lease, 43 CFR 3210.4.

Appeal of that decision was timely noted. Nowers and one Hydro-Search, Inc., are named adverse parties, and a joint answer in opposition has been submitted accordingly. 3/

Appellant's appeal of denial of the lease and protest to the BLM determination to convey to Nowers are founded on the belief that execution and recordation of the warranty deed as a fee simple conveyance irrevocably extinguished any title or interest appellee Nowers might have in the subject lands.

Great reliance is placed on the fact that neither BLM nor appellee has rectified the matter in the 22 years since the exchange was consummated. In appellant's view, this inaction constitutes abandonment of any claim of right appellee might have against the United States.

Appellant cites published notices and letters requiring additional evidence of appellee in connection with processing the exchange, in which the mineral reservations were or were not reiterated. Presumably, such documents are offered as evidence negating the intentions of the parties with regard thereto. We reject these vague arguments. Aside from the fact that such documents serve specified purposes not here relevant, the record of private exchange U-0519 clearly demonstrates that the exchange was for surface rights only.

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3/ We confess some confusion. Dr. John V. A. Sharp is President of Hydro-Search, Inc. Either he personally or that corporation is attorney-in-fact for Supron Energy Corp. which is the current geothermal lessee of Nowers. A copy of the lease agreement shows Sharp signed it on behalf of Supron, but failed to show in what capacity. We believe Nowers and Supron are the proper adverse parties to this appeal. 43 CFR 4.410. For our purposes, we resolve the confusion by assuming, without deciding, that Sharp personally is the attorney-in-fact for appellee Supron.

Lastly, appellant contends that the possibility of unjust enrichment of the United States "does not justify transfer of ownership," on his suggestion that the United States has indeed enriched itself unjustly on "hundreds" of occasions.

Appellees preliminarily challenge appellant's standing to question title to the mineral rights on the theory that a geothermal resources application vests no rights in the applicant. McTiernan v. Franklin, 508 F.2d 885 (10th Cir. 1975) is cited in support of that proposition, and further, to demonstrate that an administrative proceeding is not the appropriate forum before which to try title to land.

The omission of the mineral reservation from the warranty deed is characterized a "clerical error" which may be corrected at any time. Appellees argue that this Board is bound by general principles of contract construction to effectuate the intent of the parties. In the same vein, the accuracy of the land status records is denied, on the ground that title "cannot be determined without examination of the U-0519 case file."

Appellees correctly deny that Nowers abandoned his mineral interests in the subject lands. The fact that appellee Nowers has on two occasions leased his mineral interest negates the specific intent requisite to proof of abandonment of a claim. See 1 Am. Jur. 2d Abandonment §§ 15-17 (1962).

Finally, it is argued that as the exchange was clearly for surface rights only, the United States is obligated under the doctrine of unjust enrichment, to grant the relief dictated by these circumstances.

Thus, in addition to the preliminary question of appellant's standing in this matter, the two-fold issue presented is whether appellee Nowers is entitled to corrective action, and if so, in what manner the reconveyance should be accomplished.

Appellees' objection to appellant's standing is without merit. He is clearly a party adversely affected by the decision of BLM, and therefore entitled to appeal as of right. 43 CFR 4.410. McTiernan v. Franklin, supra, was an action to quiet title to mineral lands in the United States as against the State of Oklahoma. Plaintiff was a noncompetitive oil and gas offeror who sought to compel the Secretary of the Interior to adjudge title in the United States and direct issuance of the leases to him. Thus, although the case is correctly cited for the propositions stated, it is inapposite to the case before us.

As we stated in our previous decision and Order, supra, appellant is correct insofar as he asserts that naked legal title to the

subject lands resides in the United States, and that the land status records accurately reflect this fact. The matter does not end there, however, because the controversy concerns equitable title thereto.

Appellee Nowers has submitted his affidavit attesting to the well-documented facts demonstrating that the exchange was for surface rights only. The affidavit further states that appellee was assured by his attorney of that time that the warranty deed was properly drafted. In short, this case is a classic instance of mistake of fact, of which all parties to the exchange are fully knowledgeable. 27 Am. Jur. 2d Equity § 28 (1966).

"To entitle a party to a transaction to relief on the ground of mistake, the fact concerning which he was ignorant or mistaken must be shown to be the one which was calculated to influence or control his conduct in joining therein." Id. section 32.

[1] We hold that appellee has carried his burden of proving the invalidity of the United States' title to the mineral interests in the subject lands. It appears that he is therefore entitled to issuance of a disclaimer of interest in the mineral estate. This Board, no less than the judiciary, is bound to do that which in equity and good conscience should be done. We agree with appellees that a contrary decision would indeed place the United States in the untenable position of unjustly enriching itself.

Appellant makes much of the lack of definitive remedial action on the part of the parties to the exchange. The argument is immaterial in view of the true intentions and knowledge of the parties and their subsequent actions in accordance therewith. Moreover, it has been stated that until the enactment of FLPMA, supra, there existed no authority by which BLM could issue documents in the nature of disclaimers or quitclaim deeds. S. Rep. (Committee on Interior and Insular Affairs) No. 94-583 at 50, to accompany S. 507, 4/ 94th Cong., 1st Sess. (1975). Legislative History reprinted in Publication No. 95-99 at 115 (April 1978) (Committee on Energy and Natural Resources).

In view of the foregoing, all that remains to be decided is how the error should be rectified. The regulation considered by the Utah State Office states the following:

43 CFR § 2204.3 Return of title evidence.

If an applicant has submitted deed and title evidence in connection with an exchange and his application is

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4/ The Senate bill, S. 507, 94th Cong., 2d Sess. (1976), was passed in lieu of the House bill, H.R. 13777, 94th Cong., 2d Sess. (1976), after amending its language to contain much of the text of the House bill. 1976 U.S. Code Cong. & Ad. News 6175 (94th Cong., 2d Sess.).

rejected, the evidence of title will be returned to the applicant. If the deed was recorded, a quitclaim deed for the land conveyed to the United States will be issued under section 6 of the Act of April 28, 1930 (46 Stat. 257; 43 U.S.C. sec. 872). [Emphasis supplied.]

The provisions of 43 CFR 2204.3 authorize issuance of a quitclaim deed only when a deed to offered lands is tendered by an applicant in furtherance of an exchange, and the exchange application is thereafter rejected or withdrawn. 43 U.S.C. § 872 (1976). Manifestly that is not the case before us.

As was earlier noted, the Regional Solicitor's Office expressed the view that FLPMA, Section 315, 43 U.S.C. § 1745 (1976) is the appropriate authority. That opinion is correct.

That Act states the following:

#### RECORDABLE DISCLAIMERS OF INTEREST IN LAND

Sec. 315. (a) After consulting with any affected Federal agency, the Secretary is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or (2) the lands lying between the meander line shown on a plat of survey approved by the Bureau or its predecessors and the actual shoreline of a body of water are not lands of the United States; or (3) accreted, relicted, or avulsed lands are not lands of the United States.

(b) No document or disclaimer shall be issued pursuant to this section unless the applicant therefor has filed with the Secretary an application in writing and notice of such application setting forth the grounds supporting such application has been published in the Federal Register at least ninety days preceding the issuance of such disclaimer and until the applicant therefor has paid to the Secretary the administrative costs of issuing the disclaimer as determined by the Secretary. All receipts shall be deposited to the then-current appropriation from which expended.

(c) Issuance of a document of disclaimer by the Secretary pursuant to the provisions of this section and regulations promulgated hereunder shall have the same effect as a quit-claim deed from the United States. [Emphasis supplied.]

The provisions of FLPMA, section 315(c), supra, have been interpreted as requiring the promulgation of regulations by the Secretary

of the Interior before any action may be taken to issue a document of disclaimer thereunder. Cf. Ernest Alpers, A-30627 (Mar. 10, 1967). The Secretary has not promulgated any such regulations for section 315. BLM should suspend further action on any application from appellee Nowers for a document of disclaimer until such regulations are promulgated or a specific policy directive under FLPMA is issued by the Director, BLM. Cf. Grace Cooley Coleman, 35 IBLA 236 (1978).

[2] The issuance of a lease for geothermal resources is discretionary with the Department, and where it is doubtful that the United States has equitable title to the resource, an application for geothermal resources should be rejected and not held in suspension pending a determination of the title question. See NL Industries, 34 IBLA 99 (1978); Georgette B. Lee, 10 IBLA 23 (1973). In the circumstances of this case, the rejection of appellant's application for a geothermal resources lease was not improper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the case remanded for further action consistent herewith.

Douglas E. Henriques  
Administrative Judge

I concur.

Joseph W. Goss  
Administrative Judge



ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

This case involves the simple situation where a geothermal resources lease application is filed for land for which the United States holds legal title to the minerals and conceivably the equitable title to the minerals of its land is in another party, i.e., Emil Nowers.

Nower's right to a quitclaim deed has not been adjudicated by BLM and it is premature to make such a determination here, absent an application filed in conformity with such regulations as the Department may promulgate to effectuate 43 U.S.C. § 1746 (1976).

As matters now stand, the application rejected by the Utah State Office relates to a resource whose title is in doubt. As we held in NL Industries, Inc., 34 IBLA 99 (1978), it is proper to reject an offer for a particular resource where title thereto is uncertain and to refuse to suspend the offer pending determination of the title issue. See Georgette B. Lee, 10 IBLA 23, 26 (1973).

I would dispose of the appeal on the dubious title basis without further emendation.

Frederick Fishman,  
Administrative Judge

